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Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties

ABSTRACT. With the nation's treaty obligations proliferating and foreign affairs cases taking up a growing share of the Supreme Court's docket, it is surprising how undertheorized the field of treaty interpretation remains. To fill this void, some have suggested that textualism, which has had a major impact on statutory interpretation over the past two decades, should be applied to treaty interpretation. This Note rebuts that notion and suggests instead that courts draw from modern contract theory in developing canons of treaty interpretation.

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INTRODUCTION

The Supreme Court has long stated that treaties adopted under Article II of the Constitution are not acts of “legislation” but rather “contracts” between sovereign nations.¹ This contract analogy was most recently invoked by both the majority and the dissent in *Olympic Airways v. Husain*.² Increasingly, however, the Court’s treaty jurisprudence has borne the mark of “new textualism.”³ Starting with his concurring opinion in *United States v. Stuart*,⁴ Justice Scalia has vigorously argued that separation of powers and rule of law concerns dictate that the Court restrict its inquiry in treaty interpretation cases to the four corners of the agreement. Although the Court as a whole has not accepted all aspects of Scalia’s argument—such as his aversion to the use of materials from Senate ratification debates⁵—textualism has become influential in treaty interpretation.

The coexistence of these two themes in treaty jurisprudence—textualist methodology and the notion that treaties are contracts—is problematic. Contracts are valid only to the extent that there is mutual assent by the contracting parties to a shared proposition.⁶ The text of the contract document is important in determining the scope of the agreement, but it serves only as *evidence* of what the agreement is. In the legislative context, the text of a statute *is* the agreement. As a result of this divergence, the interpreter’s tasks in the construction of contracts and statutes are fundamentally different. The interpreter in a contractual dispute is interested primarily in how the parties themselves would interpret the terms of the contract. An interpreter of statutes

1. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 235-37 (1796).

2. 540 U.S. 644 (2004).

3. The term “new textualism” was coined by Professor William Eskridge to describe the interpretive methodology championed by Justice Scalia that focuses on the text of the statute and disallows references to contextual evidence such as legislative history. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Justice Scalia gave a thorough explanation and defense of textualism in his Tanner Lectures. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

4. 489 U.S. 353, 373 (1989) (Scalia, J., concurring).

5. See, e.g., *Air France v. Saks*, 470 U.S. 392, 397-400, 403 (1985); *INS v. Stevic*, 467 U.S. 407, 417-18 (1984); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 250, 257 (1984). See generally Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT’L L. 546 (1989) (discussing Supreme Court citations to Senate pre-ratification materials in treaty cases).

6. 1 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 1:3 (4th ed. 1990).

following a textualist methodology focuses on the meanings that neutral third parties ascribe to particular terms.

This Note will argue that between these two contending principles of treaty interpretation, the contract analogy should prevail. The strongest justifications for textualism in statutory interpretation—adherence to the Article I, Section 7 lawmaking process and greater legislative accountability—do not extend to the treaty context. Likewise, as a practical matter, it is harder to apply textualism to treaty interpretation because certain interpretive aids that textualists employ—linguistic canons and references to how given terms are used in the *U.S. Code* at large—are inappropriate guides to resolving ambiguities in treaties. The contract approach, by contrast, has strong grounding in the text, structure, and history of the Constitution. Further, contract theory could succeed where existing treaty doctrine fails, by providing a consistent, well-grounded framework for courts to use when resolving ambiguities in treaties.

Specifically, the courts should borrow from relational contract theory in developing new canons of treaty interpretation. Within this framework, contract formalism—textualism’s private law cousin—would continue to play a role in treaty interpretation, particularly for treaties of limited scope that resemble one-time, discrete contracts in a commercial setting. However, a more flexible interpretive approach should apply to treaties that govern repeat interactions between parties over a long period of time. In the context of these “relational” treaties, the range of sources available to the interpreter would be much broader than that endorsed by textualists in the statutory context, and over time this approach could both reduce the costs of treaty negotiation and encourage foreign parties to assent to dispute resolution by U.S. courts.

I. STATE OF THE DOCTRINE

With the nation’s treaty commitments proliferating⁷ and foreign affairs cases constituting a growing share of the Supreme Court’s docket,⁸ it is

7. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396 (1998) (“[T]here has been a proliferation of treaties [in the latter half of the twentieth century], such that treaty-making has now eclipsed custom as the primary mode of international lawmaking.”); Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT’L L. 321, 322 (2001) (stating that “the number of treaties deposited in the United Nations” has “more than doubled” during the past twenty years); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1304 (2000) (“[I]nternational treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds.”).

surprising how undertheorized the field of treaty interpretation remains. The Court has developed well-worn interpretive canons in statutory cases that implicate the international obligations of the United States,⁹ but the rules for interpreting the treaties that give rise to those obligations remain few and underdeveloped. Similarly, most scholarship on treaty interpretation is focused on the separation of powers,¹⁰ the subject-matter limitations on the scope of the treaty power,¹¹ or the distinctions between self-executing and non-self-executing treaties.¹² Despite the renaissance in statutory interpretation scholarship over the past decade, there has been relatively little discussion either in court opinions or in the scholarly literature of the proper tools and methods that judges should use to interpret the text of a treaty.

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8. In the 2003 and 2004 Terms, at least eleven cases involving foreign affairs or treaty interpretation issues reached the Court. Two were treaty interpretation cases: *Medellin v. Dretke*, 544 U.S. 660 (2005) (per curiam), and *Olympic Airways v. Husain*, 540 U.S. 644 (2004). Three were cases arising from the war on terror: *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). One, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), involved the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). Two were foreign sovereign immunity cases: *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). One case involved the extraterritorial reach of antitrust laws: *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). One was an international tax case: *Pasquantino v. United States*, 544 U.S. 349 (2005). Finally, one case involved the transnational reach of a federal statute on discovery: *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). See generally Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004) (noting the increasing share of international law cases on the Supreme Court's docket).
 9. See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that statutes should be construed, whenever possible, to be consistent with customary international law); see also *Hoffmann-La Roche*, 542 U.S. at 164 (arguing that the rule of comity ordinarily requires courts to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations").
 10. Compare JOHN NORTON MOORE, *TREATY INTERPRETATION, THE CONSTITUTION AND THE RULE OF LAW* (2001) (arguing for deference to executive interpretations of treaties), with Vagts, *supra* note 5 (arguing for a Senate role in treaty interpretation).
 11. See, e.g., Bradley, *supra* note 7 (examining federalism limitations on the treaty power); Golove, *supra* note 7 (same).
 12. Compare LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 190, 201 (2d ed. 1996) (arguing for a strong presumption that treaties are self-executing), with John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism and the Constitution*] (arguing for a presumption against self-execution), and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (same).

A. Treaty Interpretation in the Supreme Court

A trio of cases, *United States v. Stuart*,¹³ *Chan v. Korean Air Lines, Ltd.*,¹⁴ and *Olympic Airways v. Husain*,¹⁵ illustrates the Court's recent approach to treaty interpretation. Two dominant themes run through these cases: recognition that a treaty interpreter should start with the text of the agreement, and acknowledgment that treaty interpretation is different from statutory interpretation because treaties are contracts, not acts of legislation.¹⁶

Stuart involved a bilateral tax treaty between the United States and Canada that required tax authorities in both countries to share information necessary to determine taxpayer liability. The taxpayer in *Stuart* argued that U.S. law prohibited the IRS from issuing an administrative summons to collect information about a taxpayer's liability if the matter had been referred to the Justice Department for possible criminal charges.¹⁷ The treaty with Canada did not contain an express prohibition on information-sharing in the context of a criminal investigation, but it did stipulate that the respective tax collection agencies were obliged to provide only as much information as each agency could "obtain under its revenue laws."¹⁸ The question presented to the Court was whether tax authorities in the United States needed assurance from Canadian authorities that they would not seek criminal charges against the taxpayer before complying with information requests. The majority disagreed with the taxpayer's interpretation of the relevant U.S. "revenue law," but suggested that the purposes of the treaty supported a holding that compliance with the information request was required.¹⁹ The majority drew support from the Senate pre-ratification debate, the negotiating materials, and the past practice of the treaty signatories.²⁰ Likewise, the Court reaffirmed dicta from an earlier treaty case, *Bacardi Corp. of America v. Domenech*,²¹ stating that a

13. 489 U.S. 353 (1989).

14. 490 U.S. 122 (1989).

15. 540 U.S. 644 (2004).

16. For more complete overviews of treaty interpretation in the Rehnquist Court, see David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLAL. REV. 953, 979 (1994); and Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 724 (1998).

17. 489 U.S. at 357; see 26 U.S.C. § 7602(d) (2000).

18. Convention Between the United States of America and Canada Respecting Double Taxation, U.S.-Can., art. XIX, Mar. 4, 1942, 56 Stat. 1399, 1405.

19. *Stuart*, 489 U.S. at 365-68.

20. *Id.* at 366-70.

21. 311 U.S. 150 (1940).

treaty should generally be “construe[d] . . . liberally to give effect to the purpose which animates it.”²²

Concurring in the judgment in *Stuart*, Justice Scalia argued that it was inappropriate for the Court to resort to extratextual aids because the meaning of the relevant terms in both the statute and the treaty were sufficiently clear.²³ As a normative matter, Scalia argued that sticking to the text would ensure greater predictability in treaty interpretation than recourse to context and negotiating materials:

[N]o one can be opposed to giving effect to “the intent of the Treaty parties.” The critical question, however, is whether that is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns’ carefully framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a “genuine” contrary intent elsewhere. To ask that question is to answer it.²⁴

Scalia went on to criticize dicta in other treaty cases suggesting that extratextual material could be used to override the text of a treaty.²⁵ Justice Scalia’s concurrence in *Stuart* coincided with the Court’s increased focus on the plain meaning of the text in statutory interpretation²⁶ and has been recognized as his attempt to import the same interpretive method to the construction of treaties. As one commentator put it, Justice Scalia’s concurrence is “as clarion an expression of the textualist canon of treaty interpretation [as] one is likely to find in a Supreme Court opinion.”²⁷

22. *Stuart*, 489 U.S. at 368 (quoting *Bacardi*, 311 U.S. at 163).

23. *Id.* at 371 (Scalia, J., concurring in the judgment).

24. *Id.*

25. “[T]he implication is that, had the extrinsic evidence contradicted the plain language of the Treaty it would govern. That is indeed what we mistakenly said in the earlier case that the Court cites as authority for its approach.” *Id.* (discussing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982)).

26. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 227 (1994) (noting that after 1986, the Court “has been somewhat more willing to find a statutory plain meaning and less willing to consult legislative history”).

27. Bederman, *supra* note 16, at 979. *Stuart* was Justice Scalia’s first application of these principles to the field of treaty interpretation, and it represents a shift from an earlier opinion he authored in *O’Connor v. United States*, 479 U.S. 27 (1986). The *O’Connor* opinion affirmed a decision of the Federal Circuit that had itself overturned an earlier opinion by a leading textualist, Judge Kozinski, then the Chief Judge of the Court of Federal Claims. Judge Kozinski’s opinion, which reads like a precursor to Justice Scalia’s *Stuart* concurrence,

On the textualist view, judges should not divine the intent of particular legislators but should focus instead on the commonly understood definitions of the words in the statute.²⁸ By relying on neutral, third-party understandings rather than the subjective interpretations of the legislators who drafted the statute, judges will be less inclined to find ambiguity as a vehicle for importing their own policy views into the law. The resulting interpretive methodology is said to be more predictable²⁹ and more consistent with both the rule of law³⁰ and the role of an Article III judge.³¹

As applied to treaties, the textualist approach soon garnered a majority of the Court in *Chan*.³² *Chan* addressed whether an airline carrier loses the benefit of liability limitation under the Warsaw Convention for failure to provide notice of such limitations on passenger tickets in the 10-point font required by amendments to the treaty.³³ Neither the original treaty nor any of the amending agreements specified the sanctions that would result from an airline's failure to comply with the notification procedures in these situations. However, the petitioners argued that the text of the amendments and the overall purpose of the convention implied that sanctions were appropriate.³⁴ Writing for the Court, Justice Scalia rejected these appeals to the treaty's purpose. Instead, he noted that other provisions of the treaty dealing with baggage and cargo imposed sanctions for defective notice. Thus, the failure to explicitly impose sanctions for defective notice in ticketing would seem, based on the text, to have been a deliberate choice made by the drafters.³⁵ And, in

rejected reliance on the negotiating history in favor of a rigorous analysis of the treaty's text. *Coplin v. United States*, 6 Cl. Ct. 115 (1984), *rev'd* 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom. O'Connor*, 479 U.S. 27.

28. Justice Scalia noted in his concurrence in *Green v. Bock Laundry Machine Co.* that

[t]he meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is . . . most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it).

490 U.S. 504, 528 (1989) (Scalia, J., concurring).

29. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182-84 (1989).

30. See SCALIA, *supra* note 3, at 17.

31. See *id.* at 18.

32. 490 U.S. 122, 134 (1989).

33. For the relevant regulation, see Liability Limitations of Warsaw Convention and Hague Protocol, 31 Fed. Reg. 7302 (May 19, 1966).

34. See *Chan*, 490 U.S. at 125-27.

35. See *id.* at 130-33.

these situations, Scalia argued, the Court “must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting.”³⁶ This rationale echoes Scalia’s approach to statutory interpretation.³⁷

The textualist character of *Chan* gave way to a more eclectic approach in *Olympic Airways*.³⁸ There the majority, per Justice Thomas, reiterated based on prior precedent that while the text of a treaty is certainly relevant, treaties are not acts of legislation but contracts between sovereign nations. Accordingly, the Court recognized a “responsibility to read [a] treaty in a manner ‘consistent with the shared expectations of the contracting parties.’”³⁹ *Olympic Airways* concerned a provision in the Warsaw Convention authorizing liability for passenger injuries resulting from accidents on commercial airliners. The petitioner’s husband, an asthmatic passenger, had died after a flight attendant refused his request to be seated further away from the plane’s designated smoking section.⁴⁰ The Justices disagreed on whether inaction by the attendant could constitute an “unexpected or unusual event” giving rise to an accident.⁴¹ Justice Thomas, writing for the majority, considered not only the Convention’s text and dictionary definitions of “event,”⁴² but also the views of “sister signatories” such as England and Australia.⁴³ Even Justice Scalia, in dissent, nodded to the contractual nature of treaties by relying heavily on judicial opinions from foreign signatories to support his argument.⁴⁴

36. *Id.* at 134.

37. See, e.g., *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

38. 540 U.S. 644 (2004).

39. *Id.* at 650 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

40. *Id.* at 647-48.

41. Compare *id.* at 654-55, with *id.* at 659 (Scalia, J., dissenting). Note that neither party contested the definition of “accident” under the Warsaw Convention as established by *Saks*. *Id.* at 650, 651 & n.6 (majority opinion).

42. *Id.* at 655.

43. *Id.* at 656-57.

44. Scalia acknowledged that “[f]oreign constructions are evidence of the original shared understanding of the contracting parties,” *id.* at 660 (Scalia, J., dissenting), and referenced cases decided by British courts, *id.* at 659 (citing *Deep Vein Thrombosis & Air Travel Group Litig.*, [2004] Q.B. 234), and Australian courts, *id.* at 660 (citing *Qantas Ltd. v. Povey* (2003) 11 V.R. 642, ¶ 17, at 652 (Ormiston, J.A.)).

B. The Theoretical Problem

The coexistence of textualism and the contract analogy in treaty jurisprudence is problematic because contract theory assumes precisely what textualism disclaims: that interpretation should be guided by the “shared expectations of the contracting parties.”⁴⁵ Under textualism, interpretation is an inherently objective task: words have meanings, and the understandings of neutral third parties govern.⁴⁶ Contract interpretation, by contrast, is at least in part a subjective task under modern doctrine because the contract itself exists only to the extent that there is mutual assent among the parties to a shared proposition.⁴⁷

When interpreting contracts, courts uncover the expectations of the parties by considering not only the written words of the contract but also the outward acts of the parties that provide evidence of mutual assent to a shared proposition.⁴⁸ The “meeting of the minds” analogy for describing the basis of contract has survived⁴⁹ – and, more importantly, so has the argument for using contextual factors to interpret the scope of contracts. This introduces an inherently subjective element into contract interpretation. Courts must be careful to give weight only to outward manifestations of intent and not to the secret intentions of one party.⁵⁰ However, the task of determining what the contract *is* necessarily extends beyond the four corners of the written agreement.

45. *Air France v. Saks*, 470 U.S. 392, 399 (1985).

46. See SCALIA, *supra* note 3.

47. See *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch.) (holding that no contract existed when the plaintiff believed that goods would be delivered on a ship named “Peerless” sailing in December and the defendant intended to purchase goods delivered by another ship also named “Peerless” sailing in October); see also *Nat’l Envtl. Serv. Co. v. Ronan Eng’g Co.*, 256 F.3d 995, 1002 (10th Cir. 2001) (“[C]onsent to form the contract was not mutual unless the parties all agree[d] upon the same thing in the same sense.” (second alteration in original) (internal quotation marks and citation omitted)). *But see Ronan*, 256 F.3d at 1002-03 (recognizing that Oklahoma’s adoption of the U.C.C. has led to a shift away from the subjective test of intent, placing “increased emphasis on objective, observable manifestations of intent to contract”).

48. See 1 WILLISTON & LORD, *supra* note 6, § 1:3.

49. See, e.g., *Ekedahl v. COREStaff, Inc.*, 183 F.3d 855, 858 (D.C. Cir. 1999) (“Proof of a meeting of the minds may be found either in the written agreement or, if the agreement is ambiguous, in the parties’ actions at the time of contract formation.”); *Firth Constr. Co. v. United States*, 36 Fed. Cl. 268, 276 (1996) (“Contracting is a sentient process. There must be objective proof of a meeting of the minds.”).

50. See 1 WILLISTON & LORD, *supra* note 6, § 1:3.

Thus, the Court's eclectic approach to treaty interpretation would seem inherently contradictory. The remainder of this Note will explore the justifications for both theories in an attempt to create a more consistent theoretical framework for treaty interpretation.

II. THE CASE FOR TEXTUALISM APPLIED TO TREATIES

Textualists have made strong arguments for restricting judges' interpretive inquiries to the text of a statute. However, the strongest arguments for textualism in statutory interpretation arise out of an understanding of Article I, Section 7 of the Constitution, which deals with legislation, not treaties. This Part argues that the textualist approach to treaty interpretation lacks both the theoretical and normative underpinnings of textualism in the context of domestic legislation.

A. *Originalism and Treaty Interpretation*

The Constitution is silent as to the methods judges should use to interpret a legal text. The originalist argument for textualism is based largely on statutory interpretation cases in England and the colonies prior to the Founding and therefore has little direct application to treaty interpretation.⁵¹ The surviving historical sources that discuss treaties emphasize their contractual—as opposed to legislative—character. And to the extent that the Framers conceived of treaties as contracts, it is reasonable to conclude that they intended courts to interpret treaties using methods derived from the law of contracts. That was the nineteenth-century view of Chancellor Kent:

Treaties of every kind, when made by the competent authority, are as obligatory upon nations, as private contracts are binding upon individuals; and they are to receive a fair and liberal interpretation, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the *same rules of construction and course of reasoning which we apply to the interpretation of private contracts.*⁵²

51. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001). But see William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001).

52. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 163 (photo. reprint 1971) (N.Y., O. Halsted 1826) (emphasis added) (citation omitted).

Although courts have not rigorously applied the tools of contract interpretation to the law of treaties, Kent's view has been cited with approval in multiple treaty cases.⁵³

The realities of international politics and the limitations of eighteenth-century travel and communications required a treaty-making process that was more streamlined than the Article I, Section 7 legislative process. Then and now, successful treaty negotiations require real-time give and take by the parties at the negotiating table. If American negotiators had to seek approval from both Houses of Congress before agreeing to given terms in a treaty, the nation's ability to conduct foreign affairs would be seriously impaired. This was particularly true in the eighteenth century, when it might have taken weeks for negotiators to relay messages to and from their capitals. Moreover, at the time, Congress met infrequently. Chances are that important communications from ambassadors to the legislative branch would have lain unanswered for several months, further undermining the nation's diplomatic efforts.

Thus, it made sense for the Framers to vest a significant degree of authority in the executive branch. As James Wilson explained:

Some gentlemen are of opinion that the power of making treaties should have been placed in the legislature at large; there are, however, reasons that operate with great force on the other side . . . [I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make; they will be made between us and powers at the distance of three thousand miles. A long series of negotiation will frequently precede them; and can it be the opinion of these gentlemen that the legislature should be in session during this whole time?⁵⁴

Wilson and his colleagues recognized that Article I, Section 7's division of labor between the executive and legislative branches, which the Founders believed carried great virtues in the statutory context, would severely constrain the new nation as an actor on the international stage if applied to treaties. Therefore, a parallel lawmaking track was in order. Whereas the House, Senate, and President would all negotiate in the statutory context, the executive would

53. See, e.g., *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *Coplin v. United States*, 6 Cl. Ct. 115, 126 n.11 (1984).

54. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 506 (photo. reprint 1987) (Jonathan Elliot ed., N.Y., Burt Franklin 2d ed. 1868) [hereinafter ELLIOT'S DEBATES].

represent the interests of the United States in treaty negotiations with foreign powers. This arrangement was both pragmatic and consistent with the notion that treaties are contracts negotiated by equal parties.⁵⁵

Materials from the ratification debates suggest that the practical differences between treaty and lawmaking reflected broader theoretical differences between treaties and statutes. As Wilson wrote, “[T]hough the treaties are to have the force of laws, they are in some important respects very different from other acts of legislation. . . . Treaties, sir, are truly contracts, or compacts, between the different states, nations, or princes, who find it convenient or necessary to enter into them.”⁵⁶ Likewise, in *The Federalist No. 64*, John Jay wrote that “a treaty is only another name for a bargain,” and that “treaties are made, not by only one of the contracting parties, but by both.”⁵⁷

Early Supreme Court practice confirms this understanding as well. The Marshall Court’s treaty cases are replete with references to treaties as contracts. In *Foster v. Neilson*, for example, the Court noted that “[a] treaty is in its nature a contract between two nations, not a legislative act.”⁵⁸ Three years later, in *Worcester v. Georgia*, the Court asked, “What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self government.”⁵⁹

The Constitution itself further illustrates the differences between treaties and statutes and gives clues as to the importance of text in treaty construction. One difference is obvious: the process for enacting statutes is outlined in Article I, whereas the treaty power is outlined in Article II.⁶⁰ A second is more

55. See THE FEDERALIST NO. 75, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy.”).

56. ELLIOT’S DEBATES, *supra* note 54, at 506.

57. THE FEDERALIST NO. 64 (John Jay), *supra* note 55, at 394; see also THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 55, at 418 (explaining that the object of the treaty power is “contracts with foreign nations, which have the force of law but derive it from the obligations of good faith” (emphasis omitted)).

58. 27 U.S. (2 Pet.) 253, 314 (1829).

59. 31 U.S. (6 Pet.) 515, 581 (1832).

60. Professor John Yoo has suggested that this structural division is key to understanding the differences between treaties and statutes. Yoo, *Globalism and the Constitution*, *supra* note 12, at 1966 (“[A] significant textual difference between a treaty and a law is found in the treaty power’s placement in Article II, which vests the executive power in the President, rather than in Article I, which vests ‘all legislative Powers herein granted’ to the Congress. The Treaty Clause’s location suggests that treaties are executive, rather than legislative, in nature. The Senate’s participation alone does not convert treaties into legislation . . .”).

subtle but potentially instructive. Article I, Section 7, Clause 2 reads: “Every Bill which shall have *passed* the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States”⁶¹ By contrast, the Treaty Clause provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present *concur*.”⁶²

Thus, the domestic legislative process differs from treaty ratification in two related respects: first, the legislature plays a more preeminent role in the passage of domestic legislation (i.e., “passing” as opposed to “concurring”), and second, the legislature engages more directly with the text in the legislative process (i.e., concurrence with “treaties” as opposed to passage of “bills”). In the Article I, Section 7 context, the legislature controls what terms are inserted into a bill. In the treaty context, the Senate merely assents to the agreement between the President and a foreign sovereign. The treaty does not gain the force of law in the United States until ratified by the Senate, but the treaty itself exists independent of Senate action.⁶³ Granted, the Senate can give its assent only insofar as the scope of the agreement is revealed to it. But as long as the negotiating materials are available to the Senate and the President has communicated the broader purpose of the treaty, it is reasonable to assume that the Senate can assent to an agreement that extends beyond the four corners of the treaty document.⁶⁴

Precedent reinforces the notion that the Constitution requires a lower degree of legislative engagement with text in the treatymaking context than in domestic lawmaking. If the Senate objects to a particular provision, it cannot amend the language by its own accord. The Court has long held that the Senate’s power in these situations is restricted to ratifying a preexisting

61. U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

62. *Id.* art. II, § 2, cl. 2 (emphasis added).

63. Moreover, a state that signs a treaty subject to ratification assumes certain obligations under international law, if not domestic law. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, 336 [hereinafter Vienna Convention] (establishing an obligation that signatory states that have not yet ratified a treaty refrain from actions that would “defeat the object and purpose of [the] treaty”); see also Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2066-71 (2003) (discussing the obligations of states that have signed, but not ratified, a treaty).

64. Cf. *The ABM Treaty and the Constitution: Joint Hearings Before the S. Comm. on Foreign Relations and the S. Comm. on the Judiciary*, 100th Cong. 83-85 (1987) (statement of Laurence H. Tribe, Professor, Harvard Law School) (arguing that secret treaty terms of which the Senate is not aware cannot have the force of law because the Senate cannot concur in such agreements).

agreement⁶⁵ or refusing to ratify altogether. Although the Senate can suggest reservations, declarations, and understandings to the treaty text, only the executive and the other parties to the treaty can provide the assent necessary for a new provision to become part of the treaty. Thus, it would be fair to conclude that the actual terms in the document are important in determining the precise scope of the agreement, but, in contrast to the text of a bill, the text of a treaty is merely evidence of the agreement—not the agreement itself. As a contract, the treaty comes into being when there is an offer and acceptance, culminating in mutual assent to a shared proposition.

B. Public Choice Theory and the Structural Case for Textualism in Statutory Interpretation

The most compelling justification for a textualist approach to statutory interpretation derives from the structure of lawmaking under the Constitution as understood through the insights of public choice theory. The bicameralism and presentment provisions of Article I, Section 7 allow for carefully balanced deals among competing interest groups.⁶⁶ Equal representation of states in the Senate enables minority coalitions to block legislation favored by the majority. In addition, the Constitution's deference to both Houses of Congress to devise their own procedures for passing legislation is a tacit endorsement of additional vetogates via the committee system or the Senate's cloture rules.⁶⁷ The deals struck during each stage of the process are enshrined in the text of those bills that survive and ultimately land on the President's desk.

Article I, Section 7 does not require the relevant parties to assent to a shared proposition before a bill becomes a law. The parties need only assent to the same text. As such, the resulting text often reflects myriad compromises. As the Court has noted, in a lawmaking system that requires backroom tradeoffs and side deals in order to secure the passage of legislation,

65. See *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 75 (1821) (stating that a treaty cannot be modified except through the exact same process by which it was initially ratified).

66. See Manning, *supra* note 51, at 18 (“[S]tatutes result from bargains struck among interest groups competing for advantage in the legislative process.”). See generally Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 233-40 (1986) (arguing that textualism creates the best incentives for a well-functioning legislative process).

67. U.S. CONST. art. I, § 5. “Vetogates” refer to a series of points in the legislative process through which prospective legislation must pass. See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.⁶⁸

Thus, in the statutory context, textualists argue that departing from the text seriously disrupts the Article I, Section 7 process. Judges who look for an overriding, coherent purpose in any piece of legislation risk upsetting the original deal struck by the relevant parties, thereby giving one side more than it bargained for. In this sense, the search for legislative purpose increases the risk of erroneous interpretation. This risk, in turn, increases the “costs of the legislative deals,” as parties to the legislative process are plagued by doubts about how courts will interpret legislative deals *ex post*.⁶⁹

Similarly, textualists argue that a dynamic approach to statutory interpretation disrupts the inherent status quo bias of the legislative process.⁷⁰ The nightmare scenario would be that a court—acting on extratextual sources that did not go through the process of bicameralism and presentment—might give an interpretation to the text that a legislative minority supported but did not have the strength to enact.

The paradigmatic case that arguably involved such a scenario is *United Steelworkers v. Weber*. In *Weber*, the Court interpreted sections of Title VII prohibiting employer actions that “discriminate . . . because of . . . race”⁷¹ to allow race-based affirmative action programs, relying on the overall ameliorative purpose of the Civil Rights Act of 1964.⁷² At this point, the legislative majority—which initially opposed affirmative action and perhaps thought that its position had been vindicated in the final version of the bill⁷³—

68. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam); see also *Hrubec v. Nat’l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995) (“Many laws are compromises, going thus far and no further in pursuit of a goal.”).

69. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 895 (1975).

70. Cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 170-72 (1993) (describing the status quo bias of the legislative process in the equal protection context).

71. 42 U.S.C. § 2000e-2(a)(1) (2000).

72. 443 U.S. 193, 204 (1979).

73. *Id.* at 230 (Rehnquist, J., dissenting).

was in a worse position to oppose affirmative action than it had been prior to the bill's passage.⁷⁴ As Professor William Eskridge explains:

[T]here has been no serious effort to overrule the *Weber* decision legislatively. Any proposal to do so would be highly conflictual, with intensely interested groups on either side of the issue, giving members of Congress substantial incentives to avoid taking stands on minority rights issues. Even if a bill to overrule *Weber* had majority support in Congress, it would probably face insurmountable procedural obstacles.⁷⁵

In other words, by shifting the burden of changing the status quo, purpose-based interpretation may have enabled the supporters of affirmative action to win in the courts what they could not achieve through the legislative process. Moreover, should a majority attempt to correct a judicial decision through legislation, the original error could be reinforced if the minority coalition were able to protect its court-granted spoils using control over vetogates. In subsequent cases, judges might then conclude that the legislature's failure to enact legislation overturning the court's interpretation is itself evidence of acquiescence.⁷⁶

Driven by this view of the legislative process, textualists argue that it is best to assume that "legislators and judges are part of a common social and linguistic community, with shared conventions for communication."⁷⁷ Therefore, when interpreting the words of a statute, judges should look neither to the particular meanings ascribed by participants in the legislative process nor to the overall purpose of the statute, but instead to "social and linguistic conventions shared by the relevant community."⁷⁸ By limiting the number of

74. Proponents of a more activist approach to statutory interpretation use the "burden of inertia" argument in a different way. These scholars argue that vetogates in the legislative process create an inherent status quo bias that allows entrenched minorities to prevent the updating of statutes. Therefore, judges should feel more comfortable overturning old statutes that reflect the status quo bias of the legislative playing field. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 92-101 (1982); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 500-04 (2001).

75. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1525 (1987) (footnote omitted).

76. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 125-38 (1988).

77. Manning, *supra* note 51, at 16.

78. *Id.*

inputs into the interpretive process, proponents of textualism hope to reduce the risk of judicial error.

Textualism also aims to enhance electoral accountability.⁷⁹ As textualists argue, purpose-based interpretation allows legislators “to pass off difficult choices of policy to others and that such behavior sabotages the project of electoral accountability.”⁸⁰ To use the *Weber* example again, it is possible that legislators who drafted the broad language of Title VII did so hoping that courts would rely on the ameliorative purpose of Title VII rather than the plain meaning of “discriminate” to hold that affirmative action programs are allowed under the statute. At the same time, the arguable ambiguity of the text would provide the same legislators with political cover from constituents who opposed affirmative action. In this situation, it would be difficult for voters who opposed affirmative action to hold their representatives accountable.

Textualism seeks to prevent this kind of strategic obfuscation by limiting judicial inquiries to the face of the statute. Not consulting legislative history or the overall purpose of the statute means that judges are not in the business of cleaning up after legislators; the legislators themselves take on that burden and any electoral consequences that result. In this sense, textualism acts as a type of “penalty default rule” that systematically penalizes Congress when it tries to punt difficult policy choices to the judiciary.⁸¹

C. *The Structural Argument Applied to Treaty Interpretation*

While the factors discussed above make a compelling case for textualism in the interpretation of statutes, this argument does not extend to the interpretation of treaties. The absence of bicameralism and presentment requirements for treaties makes the judicial search for “intent” in treaty interpretation less problematic. As a theoretical matter, the judge’s task in interpreting a treaty is simplified by the basic assumption of contract law that for every agreement there is a single interpretation of the agreement to which all parties to the contract have consented. In the absence of overlapping consent, there is no contract.⁸² In contrast, Article I, Section 7 requires no

79. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 641-42 (1995) (noting that Justice Scalia “us[es] interpretive strategies to modify congressional behavior”).

80. *Id.* at 642.

81. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (introducing the concept of penalty defaults).

82. Granted, the notion of overlapping consent or a “meeting of the minds” may be as much a legal fiction in the treaty context as in the legislative context. However, the “meeting of the

“meeting of the minds,” only the passage of identical text. There may be as many as 536 different interpretations of a particular bill that do not overlap (one for each member of Congress and the President).

Yet the strongest argument in favor of a distinct interpretive regime for treaties is that the procedural differences between treaty-making and lawmaking lower the risk of judicial error in the treaty context. As noted above, in the statutory context, the Article I, Section 7 process allows a minority of legislators to use its control over vetogates to block corrective legislation following a judicial interpretation contrary to the expectations of the enacting legislative majority. The risks are lower in the treaty context because parties have the right to cancel the treaty through withdrawal. Even though the ability of the executive to withdraw from treaties is the subject of some debate in the academic literature,⁸³ the United States has withdrawn from treaties unilaterally in the past,⁸⁴ and the ability of parties to negotiate exit clauses is beyond doubt.⁸⁵ The possibility of exit gives the dissatisfied party the option to

minds” analogy is still very much a part of modern contract doctrine. See, e.g., sources cited *supra* note 49. As a practical matter, the idea of mutual assent to the same proposition is more appropriate for a process characterized by offer and acceptance than for a process of bicameralism and presentment. As a theoretical matter, this fiction is at the heart of contract theory and is a central factor in contract interpretation. Moreover, to the extent that the Framers intended judges to view treaties as contracts, it is a fiction the Constitution implicitly endorses.

83. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 356-59 (2003). *Goldwater v. Carter*, 444 U.S. 996 (1979), presented the Supreme Court with the question of whether the President can unilaterally terminate a treaty. That case involved President Carter’s efforts to terminate the United States’ mutual defense pact with Taiwan. Members of Congress filed a complaint in federal court to enjoin termination of the treaty. The district court held that withdrawal required either Senate consent or the approval of both Houses of Congress. See *Goldwater v. Carter*, 481 F. Supp. 949, 964-65 (D.D.C. 1979). The Supreme Court vacated the order but failed to issue a majority opinion resolving the scope of the President’s power to unilaterally terminate treaty obligations. *Goldwater*, 444 U.S. at 996-97.
84. In recent years, the United States has withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations. See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.
85. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1582 (2005) (“Treaty clauses that authorize exit are pervasive.”). The United States recently withdrew from the ABM Treaty, which contained such a clause. See Paula A. DeSutter, Assistant Sec’y of State for Verification, Compliance, & Implementation, State Department’s Role in Missile Defense, Remarks at the National Defense University Foundation Congressional Breakfast Seminar Series (Apr. 4, 2006), <http://www.state.gov/t/vci/rls/rm/64126.htm> (“As permitted by the ABM Treaty, the U.S. gave notice in December 2001 of its intention to legally withdraw from that Treaty in order to begin developing and deploying capabilities to protect the population and territory of our fifty states.”).

cancel the existing agreement and renegotiate, or to use the threat of withdrawal as leverage to encourage the other parties to amend the treaty.⁸⁶ Similar options could be exercised whenever a domestic court seriously misinterprets terms of the agreement. In reality, the dissatisfied party might tolerate an error in construction if the costs of withdrawal and renegotiation are prohibitive. Nevertheless, that party's ability to correct an erroneous interpretation remains relatively stronger than that of a similarly situated legislative majority in the statutory context. Vetogates may prevent the majority from successfully passing legislation to overturn the court's decision. And even if the majority in one chamber succeeds in doing so, the Supreme Court's decision in *INS v. Chadha*⁸⁷ precludes one-House withdrawal from statutes.

The possibility of withdrawal also helps obviate the electoral accountability problem that purpose-based interpretation allows in the legislative context. If voters are unhappy with a particular judicial construction of a treaty, they can demand that the President withdraw from the agreement. Because the powers of the office arguably allow the President to take this action,⁸⁸ and because many treaties provide in their text a means for termination, the President will be more accountable for his refusal to withdraw from a treaty after a court gives it an unintended construction.

There is also less cause to believe that textualism can operate as an effective default rule in the treaty context. The unstated assumption behind this idea is that the legislature has perfect information about the decisions courts make and that, over time, textualist judges will force Congress to legislate with greater precision.⁸⁹ In the legislative context, these assumptions would seem reasonable. Congress is a fixed assembly that meets regularly and can correct any interpretations with which it disagrees. In addition, it is divided into

86. The United States has used this strategy in a number of contexts. For example, the United States withdrew to force amendments to the agreement establishing the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the mid-1980s. See *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT'L L. 962, 977 (2003) (discussing the United States' return to UNESCO).

87. 462 U.S. 919 (1983).

88. See *supra* notes 83-84 and accompanying text; see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 191 (2005) ("In the event of a treaty partner's breach or collapse, or an executive-branch renegotiation with the partner, a president might act to abrogate or suspend a federal treaty in a way that he could not ordinarily overturn a federal statute.").

89. See Schacter, *supra* note 79, at 643-45; see also *id.* at 643 n.273 ("Scalia's formalist rigor can be understood as a belief that such textualism will force the legislature to be more attentive to its draftsmanship.").

specialized committees that can monitor court decisions on particular topics. However, even with regard to statutes, scholars have raised serious doubts about the assumption of perfect information.⁹⁰

The interaction between courts and parties to a treaty is likely even more limited. For most treaties, there is no fixed assembly to facilitate ongoing amendments and no equivalent of standing committees to monitor the court decisions.⁹¹ Consequently, the need for courts to puzzle out the parties' intentions from contextual evidence may be greater in the treaty context than in the legislative context. Likewise, given the possibility of withdrawal, the dangers of judicial intervention are smaller.

D. *The Practical Application of Textualism to Treaty Interpretation*

Although the emergence of “new textualism” has coincided with the Court’s increased willingness to find that the “plain meaning” of the text dictates the resolution of statutory interpretation cases,⁹² textualism is distinct from clause-bound “plain meaning” interpretation.⁹³ Textualists readily

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90. The literature on Court-Congress interaction in statutory interpretation is somewhat conflicted. In an influential article, then-Professor Robert Katzmann found that legislators were unlikely to correct judicial errors in statutory interpretation because they lacked awareness of the problem. Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653 (1992). Professor Eskridge took a more sanguine view of Court-Congress interaction in an earlier study. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). However, Eskridge noted that standing committees were the key facilitators of this interaction, *see id.* at 367-72, a factor that is missing in the treaty context. In a more recent case study of the Senate Judiciary Committee, Professors Victoria Nourse and Jane Schacter concluded that evidence suggests “a strong awareness of Justice Scalia’s recent critique of legislative history and yet suggest[s] that the critique may have had only a modest impact, if any, on actual drafting practice in this committee.” Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 583 (2002). Textualism—for all its virtues—does not appear to have made statutory interpretation a predictable enterprise. Cf. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004) (reporting the results of a study in which legal experts accurately predicted the outcome of Supreme Court decisions in only 59.1% of cases in the Court’s 2002 Term).
91. A treaty regime could set up a monitoring agency to track court decisions. But this would increase transaction costs that might outweigh the benefits of the penalty default system.
92. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 246-49.
93. See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998) (reviewing SCALIA, *supra* note 3).

employ certain extratextual interpretive aids such as canons of statutory construction⁹⁴ and references to the usage of given terms throughout the *U.S. Code*.⁹⁵ The justification behind using these types of interpretive aids is twofold. First, the courts presume that Congress intends to be consistent in its usage of words and phrases unless it indicates otherwise. The idea is that Congress and the courts are part of a common legal and linguistic culture that defines words in certain ways and respects certain canons of construction.⁹⁶ The second justification is a variation on the idea of textualism as a penalty default. Even if the first assumption is something of a legal fiction, courts can foster more efficient drafting by putting Congress on notice that they intend to abide by certain rules of construction. The onus is then on the legislature to draft statutes with greater precision and to provide definitions whenever it intends to depart from the default regime. Over the long run, if the courts are consistent in their application of these rules, statutory interpretation should become more predictable for both legislators and litigants.

Yet linguistic canons and references to the “whole code” are not suitable for treaty interpretation. In the context of interpreting domestic legislation, it is reasonable to assume that the courts and Congress share a common legal culture that recognizes given canons and definitions. However, when the courts are interpreting a treaty between the United States and a foreign country, that assumption is justified only to the extent that the two countries’ linguistic and legal traditions are similar. Indeed, the Supreme Court has rejected “whole code” interpretation in treaty cases on similar grounds. In *Eastern Airlines, Inc. v. Floyd*,⁹⁷ for example, the Court rejected the argument advanced by the respondents that Warsaw Convention provisions on compensation for “bodily injury” should be read with reference to U.S. tort law. The Court noted that at the time of the negotiations, the parties to the treaty generally did not recognize damages for pain and suffering, as the U.S.

94. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (endorsing the “established canons of construction” as a guide to interpreting an ambiguous text).

95. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (Scalia, J.) (“Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”).

96. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (“Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”); Manning, *supra* note 51, at 16.

97. 499 U.S. 530 (1991).

courts later came to do.⁹⁸ Accordingly, it would be unfair to other signatories for U.S. courts to interpret terms of the treaty by referencing legal traditions these countries did not share.

Additionally, the justification for using linguistic canons as default rules is strongest when there are repeat interactions between those who draft the laws and those who interpret them. In the case of domestic legislation, the “once bitten, twice shy” rationale applies. For example, if the default regime fails to effectuate congressional intent in a given case, Congress is put on notice and will, presumably, draft future statutes with greater precision. As noted above, the doubts raised by commentators about the courts’ ability to change congressional behavior via default rules in the legislative setting—where there is a great deal of repeat interaction between courts and legislative drafters already built into the system—provide cause for deep skepticism about the effectiveness of default rules in the treaty context.

III. A CONTRACT REGIME FOR TREATY INTERPRETATION

As often as courts have repeated the axiom that treaties are contracts among nations, there has been remarkably little exploration of how contract theory should inform the law of treaties.⁹⁹ This Part asserts that insights from relational contract theory could provide judges with a new language and a new set of tools for interpreting treaties. This methodology would give the courts a consistent framework for treaty interpretation that is well grounded in the Framers’ expectations and designed to effectuate the intent of the treaty signatories.

A. Relational Contract Theory

The body of relational contract theory that has developed over the past twenty years has given judges new tools for interpreting contracts between parties who interact repeatedly over long periods of time.¹⁰⁰ Compared to

98. *Id.* at 544 & n.10, 545.

99. One exception to this statement is the canon for construing treaties with Indian tribes, which holds that ambiguities should be resolved in favor of the tribe in recognition of the unequal bargaining power between native tribes and the federal government. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766–68 (1985).

100. *See* IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *NW. U. L. REV.* 854, 886 (1978).

discrete or “spot” contracts that govern one-time interactions between parties, relational contracts are “more like marriages than like one-night stands.”¹⁰¹ The project of relational contract theorists has been to construct distinct rules of interpretation that are best suited to effectuate the intent of the parties in relational situations. For example, courts are more likely to find implied terms such as the covenants of good faith and fair dealing in cases addressing contracts governing long-term, repeat interactions. This process necessarily requires courts to go “above and beyond [the text] . . . [in] interpreting the four-corners of the agreement,” even more than in ordinary contract law.¹⁰²

Incorporating the relational aspects of contracts into contract interpretation encourages parties to enter into contracts that would otherwise be inefficient due to the high risks associated with long-term relationships. In any contractual setting—relational or otherwise—it is possible for the parties to set up their own interpretive regime as part of the contract.¹⁰³ However, for long-term contracts involving contingencies that cannot be foreseen, the cost of setting up an interpretive regime may be prohibitive. Even when the parties ultimately decide to enter into a long-term contract, they are likely to leave out important terms because the negotiating costs are too high. As one leading contracts scholar notes:

[P]arties write incomplete contracts either because (a) the resource costs of writing complete contingent contracts to solve contracting problems would exceed the expected gains or would exceed the costs to the state of creating useful defaults, or (b) the parties are unable to identify and foresee uncertain future conditions or are incapable of characterizing complex adaptations adequately.¹⁰⁴

In these cases, courts can encourage contracting by creating default rules that simulate the kind of regime that parties to relational contracts would have created in their own in a world of costless negotiations.¹⁰⁵ For example, one of the costs of entering into a long-term contractual relationship is that the parties

101. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569.

102. Jared Wessel, Note, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations*, 60 N.Y.U. ANN. SURV. AM. L. 149, 157 (1998).

103. See, e.g., Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

104. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 862 (2000) (footnote omitted).

105. *Id.*

cannot foresee contingencies that might change the value of the contract for one side or the other. Of course, parties can always renegotiate when the contingency arises. However, at this point, “the party whom events favor” will have a stronger bargaining position.¹⁰⁶ If courts can step in and develop equitable rules that track the nature of the relationship and recognize the original purpose of the contract, the risk of one party’s being the victim of unforeseen events is lowered. The key is for the court to take contextual evidence into account and to evaluate the initial contract in light of the ongoing relationship. The inquiry will look at the behavior of both parties at the time of formation and might have little to do with events that occur at the time of the breach.

As a descriptive matter, relational contract theory has been highly influential. The *Restatement (Second) of Contracts* provides that relational factors can be taken into consideration even when there is no ambiguity in a contract.¹⁰⁷ And the drafters of Article 2 of the U.C.C. embraced gap-filling when experience and practice give courts the requisite expertise.¹⁰⁸ As one scholar has written, “Quite clearly, formalism in contractual interpretation is not the approach adopted by the U.C.C.”¹⁰⁹

It is worth noting that treaties are not necessarily relational by definition. Treaties between allies share many characteristics of relational contracts. But others, such as a treaty ending an armed conflict, might more closely resemble spot contracts than relational contracts.¹¹⁰ Using the insights of relational contract theory, courts could apply a different interpretive approach to different treaties, based on the scope of the relationship at issue. If the treaty is designed to deal with a one-time issue, courts might follow a formal, textualist approach when interpreting the treaty. But if the agreement is meant to establish a long-term relationship, courts would be justified in looking beyond the four corners of the agreement. The following Subsections explore how this theory might be applied in practice.

106. Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 751 (2000).

107. RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1979) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”).

108. See U.C.C. § 1-201(3) (2001); see also Scott, *supra* note 104, at 857 n.29.

109. Scott, *supra* note 104, at 866.

110. See *infra* Section III.B.

1. Good Faith

One rule that commentators argue is particularly well suited for the relational context is the implied covenant of good faith.¹¹¹ This basic tenet of contract law requires parties to abstain from any act that would prevent or hinder performance of the contract.¹¹² Courts that apply this doctrine assume that parties to a contract undertake obligations governing their conduct that arise from the nature of the contract itself rather than from the text of the agreement. Although the doctrine of good faith is recognized by most states,¹¹³ it remains controversial,¹¹⁴ and some courts have sharply limited the doctrine in recent years.¹¹⁵

Critics of the good faith doctrine in contract law have argued that the doctrine creates too much uncertainty.¹¹⁶ However, it is not clear that this argument holds for relational contracts in general or for contracts between nations in particular. In agreements that bind parties to repeat interactions over a long period of time, any uncertainty that results from judicial construction of the good faith requirement may be overshadowed by the uncertain risks of entering into the relationship in the first place. In theory, parties can contract around any contingency, but their inability to predict the future puts inherent limits on their ability to manage risk through bilateral contracting.¹¹⁷ The longer and more intense the relationship, the more difficult it is for parties to

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111. See Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 522 (identifying scholars who explain the good faith doctrine in relational terms).
112. See RESTATEMENT OF CONTRACTS § 295 (1932). Then-Judge Cardozo laid the foundation for the modern doctrine of good faith in *Wood v. Lucy, Lady Duff-Gordon*, describing his view that certain promises are “instinct with an obligation” to act in good faith. 118 N.E. 214, 214 (N.Y. 1917) (quoting *McCall Co. v. Wright*, 115 N.Y.S. 775, 779 (App. Div. 1909)).
113. See Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585, 585 & n.1 (1996) (noting the “widespread recognition” of the doctrine of good faith among state courts).
114. See Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1246 (1999) (noting that “[c]onsiderable controversy remains” as to the precise application and scope of the doctrine).
115. See, e.g., *Barnes v. Burger King Corp.*, 932 F. Supp. 1420 (S.D. Fla. 1996) (holding that the requirement of good faith cannot override express terms in a contract).
116. For example, in *Kham & Nate’s Shoes No. 2, Inc. v. First Bank of Whiting*, Judge Easterbrook argued that even when “[l]iteral implementation of unadorned language may destroy the essence of the venture,” courts should stick to the plain meaning interpretation because a contrary reading “would reduce commercial certainty and breed costly litigation.” 908 F.2d 1351, 1357 (7th Cir. 1990).
117. See Scott & Triantis, *supra* note 103.

foresee potential problems. The chance that one party will act in bad faith raises the cost of entering into the contract in the first place, potentially rendering the cost of negotiations prohibitive. Thus, the doctrine of good faith can act as insurance against these risks and reduce transaction costs.

Although one Supreme Court opinion from the nineteenth century applied the good faith doctrine in interpreting treaty obligations,¹¹⁸ the Court has not developed this doctrine. It could, however, be a useful tool for interpreting relational treaties. Unforeseen, bad faith acts are among the risks of entering into relational treaties—including far-reaching trade agreements such as NAFTA. After the agreement is sealed, reliance interests start to develop on both sides, as businesses and governments make investments in accordance with the treaty framework. This creates the opportunity for one side to exploit for its own gain the other's reliance on the relationship.

Assume, for example, that the United States and a foreign nation enter into a free trade agreement that prohibits import tariffs but allows both parties to conduct customs inspections of imported goods. After the agreement is in place for several years, the foreign trading partner institutes a policy of invasive customs searches of American software imports designed to allow the foreign government to extract proprietary code that it will then share with its own domestic software manufacturers. Alternatively, imagine that the trading partner threatens this kind of piracy unless the United States agrees to support its favored candidate to be the Secretary General of the United Nations. The possibility that a trading partner will commit unforeseen acts of bad faith increases the cost of entering into the agreement for all parties concerned. Granted, the parties might have avoided these contingencies by writing a more detailed agreement, but that might have rendered the negotiations prohibitively expensive.¹¹⁹ Even then, the parties' inability to predict the future would create uncertainty about the protective value of the more precisely worded draft. Courts can provide a kind of insurance policy in these situations by ordering the parties to refrain from acting in bad faith, even when the agreement does not expressly prohibit such conduct.

118. *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.”).

119. See *Scott & Triantis*, *supra* note 103, at 823.

2. *Past Practice*

Current treaty interpretation doctrine allows for consideration of past practice.¹²⁰ Relational contract theory would provide a sound jurisprudential basis for this approach on three grounds. First, courts would assume that the parties' conduct after sealing the agreement is evidence of the parties' original intentions. Second, looking to past practice serves to protect reliance interests of the parties that develop over the course of the relationship. Finally, allowing judges to consider evidence of past practice might limit departure from the four corners of the agreement to those cases in which the depth of the relationship between the parties justifies such departure. If the parties have a shallow relationship that involves few interactions, formal textualist analysis of the contract may be justified from an efficiency standpoint.¹²¹ In these cases, there will necessarily be less extrinsic material relating to past practice to which courts could refer. Therefore, the judge's ability to deviate from the text is directly proportional to the scope of the relationship between the parties to the disputed contract.

3. *Parol Evidence*

Borrowing from contract theory would also help the courts determine when it is appropriate to look beyond the text of a treaty and what sources are appropriate to consult. The Supreme Court has recognized that the restrictive interpretation of the parol evidence rule should not apply in cases involving the interpretation of state compacts, and it has used extrinsic evidence to determine the scope of these agreements.¹²² If courts applied this approach to treaty interpretation, the types of extrinsic sources that would be available to the interpreter would include the *travaux préparatoires* and, in limited circumstances, Senate negotiating materials.

It is most appropriate to use treaty negotiating materials to aid in the interpretation of an agreement when there is evidence that a specific definition was a critical part of a bargain struck during the negotiations. Once a court has found that ambiguity exists, it could look at whether the provision was the

120. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (noting that the interpretation of "accident" under the Warsaw Convention relied in part upon the subsequent conduct of parties to the Convention).

121. See *infra* Section III.B.

122. See, e.g., *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (noting that "it is appropriate to look to extrinsic evidence of the negotiation history of the Compact" because "a congressionally approved compact is both a contract and a statute").

subject of debate among the negotiators.¹²³ This approach was key in *Sale v. Haitian Centers Council, Inc.*,¹²⁴ which addressed whether Article 33 of the United Nations Protocol Relating to the Status of Refugees¹²⁵ prevents a signatory from returning refugees whom it intercepts on the high seas. The Court held that even though such actions may “violate the spirit of Article 33,” the negotiating history suggested that a specific understanding had been reached to narrow the obligations imposed by an earlier draft of the treaty and that at least one nation’s accession to the Convention was contingent on the narrow understanding that the Court ultimately endorsed.¹²⁶

Senate materials also have a role in the interpretive process, but only in limited circumstances. Following on the preceding point, Senate materials are clearly relevant when the Senate has forced the parties to renegotiate.¹²⁷ Beyond the specific case of conditional ratification, however, the problem with viewing Senate materials in isolation is that it does not ensure that both parties to the treaty are represented. As the Court has noted, “There is something . . . which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power . . . , a material provision of which is unknown to one of the contracting parties”¹²⁸ Therefore, when

123. This position is consistent with Professor Hersch Lauterpacht’s argument that “in no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself. Nothing is absolutely clear in itself.” H. Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV. 549, 571 (1935).

124. 509 U.S. 155 (1993).

125. Convention Relating to the Status of Refugees art. 33.1, July 28, 1951, 189 U.N.T.S. 150, 176 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

126. *Sale*, 509 U.S. at 183, 184-87. A recent Second Circuit opinion authored by Judge Katzmann followed a more purpose-based methodology. In construing the term “habitual residence of the child” in the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention], Judge Katzmann first noted that the Convention did not specify a definition of the term, but he argued that the panel should apply a definition consistent with the purpose of the treaty: “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.” *Gitter v. Gitter*, 396 F.3d 124, 129 (2d Cir. 2005) (quoting Hague Convention, *supra*, 1343 U.N.T.S. at 98). In this context, Judge Katzmann concluded that parental intentions were of overriding significance in determining the habitual residence of the child. *Id.* at 131.

127. See *United States v. Am. Sugar Ref. Co.*, 202 U.S. 563, 565 (1906) (noting that Congress passed a resolution stating that the treaty would not take effect until it was approved, as recently amended by the Senate, by both parties to the treaty).

128. *N.Y. Indians v. United States*, 170 U.S. 1, 23 (1898).

determining whether or not to refer to Senate materials, a court would need to ask whether the materials were available to all contracting parties during the ratification debate and whether any parties objected to the interpretations Senators gave to particular terms during the course of that debate. Committee reports that were not broadly circulated or statements that were read to an empty chamber would not suffice, unless there were some indication that the parties assented to the interpretations given in those documents. Neither would reservations that the Senate included in its ratification resolution that were not accepted by all parties to the treaty.¹²⁹ This selective use of Senate ratification materials is consistent with contract theory because the purpose is not to divine the intent of the Senate but to determine the intent of the parties to the agreement—that is, the treaty parties.¹³⁰

This approach to parol evidence is also consistent with international norms. The Vienna Convention on the Law of Treaties endorses what some commentators have referred to as a “quasi-textualist” approach.¹³¹ Article 32 of the Convention cautions interpreters to consult negotiating materials only as a last resort. When a provision is “ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable,” the Convention allows the interpreter to look beyond the four corners of the written agreement.¹³² And in these situations, the Convention endorses use of certain contractual concepts—such as the doctrine of good faith¹³³—that necessarily require the interpreter to look to the purpose of the agreement.

129. Here I am only referring to reservations that are not authorized by the treaty itself. Some treaties specifically allow for reservations. See Helfer, *supra* note 85, at 1586. Notably, however, even in the absence of such provisions, other parties may object to a particular reservation as contrary to the object and purpose of the treaty. See Vienna Convention, *supra* note 63, art. 19, 1155 U.N.T.S. at 337 (requiring all reservations to treaties that do not expressly authorize or preclude reservations to comply with an “object and purpose” of the treaty test). If both the President and the Senate concur in a reservation specifically authorized by a treaty, the treaty, minus the reserved portion, is binding law in the United States. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (1987).

130. MOORE, *supra* note 10, at 16-17.

131. See Kenneth J. Vandeveld, *Treaty Interpretation from a Negotiator’s Perspective*, 21 VAND. J. TRANSNAT’L L. 281, 292-94 (1988).

132. Vienna Convention, *supra* note 63, art. 32, 1155 U.N.T.S. at 340.

133. The Convention states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” *Id.* art. 26, 1155 U.N.T.S. at 339.

B. Assessing a Contract Regime in Treaty Interpretation

Because courts and commentators have not explored the application of contract theory to treaty interpretation in great depth, there is very little literature that poses specific objections to the argument this Note advances. However, the existing literature on formalism in contract law and the role of the courts in interpreting treaties provides a guide for anticipating these objections. Although the courts and the U.C.C. have moved away from formalism in contract interpretation, this trend has received a hostile reception in some corners of the legal academy. Regardless, many of the traditional objections to relational contract theory and to a more flexible understanding of the parole evidence rule either do not apply in the treaty context or could be adequately addressed.

One of the key criticisms of inviting judicial flexibility in contract interpretation is that it increases uncertainty in commercial transactions.¹³⁴ Relational contract theory is vulnerable to this attack: as it seeks to decrease the risks of unforeseeable contingencies in long-term contracts, it introduces another element of uncertainty, namely whether or not courts will deem the contract relational. One of the major criticisms of relational contract theory is that assessing the difference between a spot contract and a relational contract is more an art than a science.¹³⁵ No contract—or treaty for that matter—is ever fully relational or fully discrete. As the founder of relational contract theory, Professor Ian Macneil, whimsically concedes, “[L]ike the ends of rainbows, the ends of the relational/as-if-discrete spectrum are mythical.”¹³⁶

This is especially true in the context of international relations, in which the distinction between allies and enemies is not always clear. Even a nation like Cuba, with whom the United States does not have formal diplomatic ties, has a “relationship” with the United States. The United States maintains a military installation at Guantánamo Bay, the two nations belong to multinational organizations such as the United Nations and the Organization of American States, and there are regular contacts between air traffic control and immigration officials from both countries.

134. See, e.g., Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 162 (1994).

135. See, e.g., Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000).

136. Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 896 (2000).

However, in the treaty context, there are several objective factors courts could use to develop default presumptions for determining whether a given treaty is relational or discrete.¹³⁷ For example, courts could ask whether the nation has formal diplomatic relations with the United States, whether it has signed bilateral trade or extradition agreements, or whether it has been designated as an aggressor or terrorist sponsor by the State Department. Courts also could draw distinctions between treaties that are intended to strike a “truce” and those that are intended to inaugurate a long-term relationship. This approach has the advantage of putting the decision about whether to depart from the four corners of the agreement into the hands of the parties themselves. As the courts develop default rules, the treaty parties will be able to order their relationships to signal their intentions as to how courts should interpret agreements between them.

Several commentators—including leading statutory textualists including Justice Scalia¹³⁸ and Judge Easterbrook¹³⁹—have also argued for a revival of formalism in contract law by voicing doubts about the ability of courts to fashion efficient rules to deal with gaps and ambiguities in contracts. The argument for formalism in contract interpretation is ultimately based on empirical assumptions about the ability of courts to determine efficient outcomes and the costs for parties to negotiate *ex ante*.¹⁴⁰ Contract formalists believe it is difficult for judges to devise broadly applicable rules that are efficient for heterogeneous parties in a complex modern economy.¹⁴¹ But federal courts have demonstrated some ability to develop such rules in at least one relational context, labor law, in which, Macneil has argued, the key statutes are relational in character.¹⁴² Over time, the courts might be able to do the same in the treaty context.

Applying contract principles to treaty interpretation might also give rise to separation of powers concerns. The conduct of foreign affairs is within the

137. Macneil answers this criticism of relational contract theory by describing the characteristics of relational and discrete contracts. Discrete contracts focus more on consent and implementation, while relational contracts seek to intensify exchange and to create new norms governing the relationship between parties. *Id.* at 896-97; *see also* Wessel, *supra* note 102.

138. *See, e.g.*, *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1153-54 (D.C. Cir. 1984).

139. *See, e.g.*, *Kham & Nate’s Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990).

140. Scott, *supra* note 104, at 875.

141. *Id.* at 863.

142. *See* Macneil, *supra* note 136, at 897.

province of the “political” branches of government,¹⁴³ and a contractarian regime for interpreting treaties necessarily involves a greater level of judicial engagement in foreign affairs issues. However, courts’ deference to the political branches in foreign affairs is not absolute, as a plurality of the Court made clear recently when it rejected the Bush Administration’s argument that Common Article 3 of the Geneva Conventions does not apply to al Qaeda.¹⁴⁴ Likewise, to the extent that courts look to signals from the executive branch in determining whether it is appropriate to depart from the text of an agreement, the political branches would retain a degree of choice in how treaties are interpreted.¹⁴⁵ And, as noted above, the President’s ability to withdraw from treaties gives the executive branch the ultimate power to determine whether a given treaty construction will have the enduring force of law. Finally, as a matter of constitutional law, the question of whether judicial actions intrude on the province of other branches depends in part on whether there is a “lack of judicially discoverable standards” for resolving the case.¹⁴⁶ This Note has argued that modern contract theory provides the necessary standards to guide judicial interpretation of treaties.

143. See *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – ‘the political’ – Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”). *But see* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (“[T]he competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”).

144. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006).

145. Deference to the executive branch’s interpretation of treaty provisions is already a well-established canon of treaty interpretation. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”). It should also be noted that a contract framework for resolving treaty disputes should have the sole purpose of effectuating the intent of the parties – without vesting “common lawmaking” powers in the federal courts. Professor Michael Van Alstine argues that courts should view treaty interpretation cases as an opportunity to revive the common law tradition. See Van Alstine, *supra* note 16, at 722. The “dynamic” role that Van Alstine has suggested that judges play in treaty interpretation raises serious separation of powers concerns and would ultimately fail to provide a predictable and consistent framework for resolving treaty disputes. See John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002).

146. *Baker v. Carr*, 369 U.S. 186, 214 (1962).

CONCLUSION

Proponents of “new textualism” have made a compelling case for why courts should stick to the written words when interpreting a statute. However, as strong as that case is, it does not naturally extend outside of the Article I, Section 7 context. When interpreting contracts between nations, the courts should not borrow wholesale from the statutory interpretation toolbox. Instead, they should look to the first principles of contract law to guide their inquiry. This approach is consistent with how the Constitution describes the treatymaking process, and it has the potential to bring some coherence to an area of the law where order is sorely needed.